FILED
JUL 30 1982
ALEXANDER L. STEVAS, CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-2368

ORPAK LINE, LTD.,

Petitioner,

v.

JAMES TURNER and PHILIPPINE PRESIDENT LINES, INC., MANILA,

Respondents.

BRIEF OF RESPONDENT JAMES TURNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK FOSSI
RAYMOND J. CONROY
870 Standard Plaza Building
1100 SW Sixth Avenue
Portland, Oregon 97204
Telephone: (503) 226-3232
Attorneys for Respondent
James Turner

I N T H E S U P R E M E C O U R T

OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-2349

JAPAN LINE, LTD.,

Petitioner,

v.

JAMES TURNER and PHILIPPINE PRESIDENT LINES, INC., MANILA,

Respondents.

BRIEF OF RESPONDENT JAMES TURNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent James Turner, plaintiff below, urges the Court to deny the petition of Japan Line, Ltd. for certiorari.

QUESTIONS PRESENTED FOR REVIEW

Respondent Turner does not agree with Petitioner's statement of issues. The issues presented by the record are more accurately set forth below:

(1) Is certiorari appropriate where (a) unrebutted evidence discloses that the officers of a vessel negligently violated a longstanding safety custom and practice which resulted in injury to respondent Turner; (b) the Ninth Circuit upheld the resulting verdict and judgment after reviewing the issues of negligence in the light of Scindia Steam Navigation Co., Ltd. v. De Los Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1 (1981) and rendering a decision consistent with Santos; and (c) there is no conflict of decision among the Circuits.

2. Does the record present any issue of "indemnity" affecting respondent Turner, when Turner obtained a judgment rendered upon a jury verdict against both defendants below.

3. In any event, is there any issue of "indemnity" which merits this Court's consideration on certiorari, when

all of the cases which have considered the issue hold that charter provisions identical to those presented by this record impose ultimate liability upon the charterer for negligence of the vessel's master in loading and discharging cargo, and there is no conflict of decision among the Circuits.

4. Will this Court grant certiorari to consider issues concerning the Federal Arbitration Act, a Japanese-American Treaty of Friendship, Commerce and Navigation, or "most favored nation treatment guaranteed under treaty to Japanese companies" (Pet. Br., p. 4), where those issues were never raised either in the District Court or Court of Appeals by opening briefs or briefs on petition for rehearing; and the decision below discloses no violation of statute or treaty.

TABLE OF CONTENTS

	Page
Questions Presented for Review...	1
Statement of the Case.....	4
Reasons Why The Writ Should Not Be Granted.....	13
1. The decision below does not impose "liability without fault", and is consistent with this Court's opinion in Scindia Steam Navigation Co. v. De Los Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1 (1981). Indeed, the Ninth Circuit rendered its decision in the light of Santos.	13
2. The decision below is not in conflict with decisions of other Circuits.....	17
3. The Court below did not "depart from the accepted and usual course of proceedings" in failing to discuss a trivial issue raised on appeal by Petitioner, i.e., that the damages awarded Respondent Turner were excessive.....	19

4. The issue of indemnity under the charter between Respondent Philippine President Lines, Inc. and Petitioner Japan Line, Ltd. does not involve respondent Turner, since Turner's verdict and judgment were against both defendants. In any event, the Ninth Circuit appears to have determined correctly that Petitioner must bear ultimate responsibility for payment of the judgment. Contrary to Petitioner's assertions, there is no conflict among the Circuits on this issue..... 20

5. Neither the "Federal Arbitration Act", or the "Treaty of Friendship, Commerce, and Navigation" between the United States and Japan were raised as defenses below. Moreover, the decision of the Ninth Circuit reveals no violation of the Act or Treaty..... 24

Conclusion..... 26

TABLE OF AUTHORITIES

Page

CASES

Affolder v. New York, Chicago & St. Louis Railroad Co., 339 US 96, 70 S Ct 509, 94 L Ed 683 (1950)..... 19

American Mail Line, Ltd. v. Weaver, 408 F2d 674, 675 (CA 9, 1969)..... 20

Bradley Mining Co. v. Boice, 194 F2d 80 (CA 9, 1951)..... 20

Fernandez v. Chios Shipping Co., Ltd., 542 F2d 145 (CA 2, 1976)..... 22

Horn v. CIA De Navegacion Fruco, 404 F2d 422 (CA 5, 1968)..... 23

Lemon v. Bank Lines, Ltd., 656 F2d 110 (CA 5, 1981)..... 17

Migut v. Hyman-Michaels Company, 571 F2d 352 (CA 6, 1978)..... 23

Nichiman Company v. M.V. Farland, 462 F2d 391 (CA 2, 1972)..... 22

Nitram, Inc. v. Cretan Life, 599 F2d 1359 (CA 5, 1979)..... 22

Ruffino v. Sandia Steam Navigation Co., 559 F2d 861 (CA 2, 1977)..... 17

Santos v. Scindia Steam Navigation Co., Ltd., 598 F2d 480, 485 (CA 9, 1979)..... 17

Scindia Steam Navigation Co., Ltd. v. De Los Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1 (1981)..... 2,13

Southern Pacific Co. v. Guthrie, 186 F2d 926, 933 (CA 9, 1951)..... 20

The New York, 175 US 187, 204-205 (1899)..... 8

Youakim v. Miller, 425 US 231, 234, 96 S Ct 1399, 47 L Ed2d 701 (1976)..... 25

STATUTES

9 U.S.C. § 1..... 24

TREATIES

Treaty of Friendship, Commerce and Navigation, April 2, 1953.. 24

RULES

Federal Rules of Civil Procedure, Rule 54(c)..... 24

STATEMENT OF THE CASE

Respondent James Turner, a longshoreman employed at the Port of Longview, Washington, suffered brain damage and resulting psychomotor seizure epilepsy when a cargo of plywood, defectively shored when it was stowed aboard a vessel in Japan, collapsed beneath his feet.

Turner brought an action against Respondent Philippine President Lines, Inc. as owner of the vessel and against Petitioner Japan Line, Ltd. as time charterer. (CR 1, 76, 77).

Respondent Turner was injured on June 13, 1974, while employed in the lower hold of the vessel PRESIDENT QUEZON (CR 393, 394; Tr. 96-97, 104-105, 111, 159, 170, 172). He was standing on top of a stow consisting of stacked bundles of plywood when the bundles collapsed, carrying Turner with them. Turner's head struck a steel stanchion.

(Tr. 111-112, 170, 172).

The stow collapsed because the bundles were stacked on each other against the curvature or "sheer" of the vessel's hull, and there was no shoring underneath. (Tr. 121-122, 146-147, 152, 162-163, 167). When layers of cargo are stacked on one another against the sheer of the hull, each layer rests partly on the bundle below it and partly above a void. Under such circumstances, it is necessary for marine carpenters or longshoremen to nail together a platform consisting of dunnage, vertical shoring and horizontal shoring in the vacant space, so that upper layers of cargo will have a firm support, and will not be resting above thin air against the curvature of the hull. (Tr. 146-147, 152, 162-163, 167, 174-175, 120-121, 173).

It was undisputed that neither plaintiff nor his stevedore employer had any

reason to suspect that the plywood cargo was unstable. (Tr. 122, 163, 174). Thus, the condition of the stow presented a life threatening trap, concealed from the longshoremen required to work about it.

Two expert witnesses, sea captains called by the plaintiff, testified without rebuttal that it is the obligation and practice of the vessel's captain and mates to inspect the work of shoring cargo against the sheer of the hull. Lack of shoring, or improper shoring, may permit the cargo to shift in the hold when the vessel rolls at sea, threatening not only the cargo but the vessel and crew. (Tr. 144, 147, 153, 167). For those reasons, as well as to protect longshoremen or seamen required to work about the stow (Tr. 144, 146, 147), it is both the duty and practice of the master and mates of all vessels of every country to supervise personally the shoring of

the cargo in those areas where it is stowed against the sheer of the hull.

Captain William Brandt testified that it is both the custom and responsibility of the officer in charge of a vessel to see that shoring is put in place (Tr. 145), and he cannot rely upon others to carry out this responsibility. (Tr. 149). Either the captain or one of his mates is always on watch on the vessel (Tr. 149, 150). The captain's replacement is the "chief mate", who is also generally called the "loading mate" (Tr. 149, 150). The mate is "supposed to check to be sure that the cargo is properly loaded, especially "at the bottom of the hatch". (Tr. 151, 152). The custom and practice of the master is the same on all vessels of all countries (Tr. 143-145).

Captain Henrik Sievers testified that the duties of a master do not vary from

one ship or nationality to another, that it is improper to stow cargo against the sheer of the vessel without shoring, and that it is the responsibility of the master to see that the cargo is properly stowed and shored. (Tr. 165-168).

The chief officer of the vessel PRESIDENT QUEZON, Captain Santos Pucan, was listed as a witness in the Pretrial Order by the vessel owner (R II, p. 402), and was actually brought to the trial by the vessel owner and was present in the courthouse during the trial (Tr. 242). Nevertheless, Captain Pucan did not testify. It is a commonplace of maritime law that once plaintiff has made out a prima facie case of negligence, the failure of a shipowner to call crew members to rebut the case is "as fatal as positive evidence in support or confirmation of the charge." The New York, 175 US 187, 204-205 (1899).

There was testimony that shoring requires many hours of work so that the ship's officers had ample time to inspect the work (Tr. 175). The vessel's log noted the hour that the marine carpenters who performed the shoring work went into the hatch where injury occurred, so that the defendants could not claim ignorance of the work. (Def. Ex. 2002; Tr. 221, 258).

Furthermore, although not before the jury, there is in the clerk's record evidence that the duties of inspection described by plaintiff's witnesses were purportedly undertaken in this case. Motoi Shikano, an executive of the marine carpenter which purportedly did the shoring work, filed an affidavit that his company from time to time "at the request of Japan Line, Ltd. rendered shoring and lashing work for Japan Line's own vessels and/or chartered vessels. All works were

done under the supervision and direction of the chief officer of the vessel and/or often under the supervision of a port captain dispatched from Japan Line, Ltd." (CR 45). With respect to the PRESIDENT QUEZON, Mr. Shikano stated: "The shoring work aboard said vessel began on May 22 at 1430 and continued until the 24th at 2130. All of the work was done under the chief officer's supervision and with his approval." (CR 46). (Emphasis added).[1]

---

1. It is a matter of historical fact, and certainly subject to proof as a matter of custom and practice under Scindia Steam Navigation Co. v. Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1 (1981) that ship's officers supervise stowage where improper stowage may damage the cargo or vessel. See, for example, the discussion of the conduct of the mate and captain described in Nichiman Company, Inc. v. M.V. Farland, 462 F2d 319, 333, (CA 2, 1972), a cargo damage case which arose before the 1972 amendments to the Longshoremen's and Harbor Workers Compensation Act. See also, Lemon v. Bank Lines, Ltd., 656 F2d 110 (CA 5, 1981).

The District Court instructed the jury solely upon traditional concepts of maritime negligence, and not, as Petitioner would have this Court believe, upon the doctrine of unseaworthiness.

The District Judge read plaintiff's allegations of negligence in failing to inspect for or require proper shoring or to warn of its absence, to the jury. The Court then instructed that a shipowner must use "reasonable care in order to avoid injury to a workman aboard the vessel in any situation in which it can reasonably be anticipated that a failure to use such care might result in such injury," (Tr. II, p. 41), and defined reasonable care and negligence in the usual manner. (Tr. II, p. 42).

The Court instructed that the vessel owner "* * * has no duty to supervise the minute details of work entrusted to a competent stevedore, so long as the

shipowner uses reasonable care." (Tr. II, p. 43).

The jury returned a verdict against both defendants, on which judgment was entered. (CR 413, 414). Both defendants filed motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. (CR 416, 448). The District Court granted judgment n.o.v. in favor of both defendants, but denied the alternative motions for new trial. (CR 530, 533, 534). The United States Court of Appeals for the Ninth Circuit ordered the judgment reinstated and held that the petitioner Japan Line "must indemnify the owner for any damages paid to plaintiff". (App-15). The defendant Philippine President Lines had filed an answer to plaintiff's second amended complaint which contained a cross-claim for indemnity against Petitioner. (CR 214, 215).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The decision below does not impose "liability without fault", and is consistent with this Court's opinion in Scindia Steam Navigation Co. v. De Los Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1 (1981). Indeed the Ninth Circuit rendered its decision in the light of Santos.

Plaintiff's pleadings charged the defendants with negligence. Turner offered unrebutted proof that the master and mates violated safety practices and duties observed by all ship's officers. The District Court's instructions were based solely upon negligence. The case was pleaded, tried, argued and submitted to the jury on negligence principles. The defendants did not rebut plaintiff's prima facie case of negligence, but instead failed even to call to the stand the vessel's captain, who had been brought

by the shipowner to the courthouse for the trial. If anything is clear from this Court's decision in Santos, it is that plaintiff may make out a case of negligence based upon the vessel's violation of a custom and practice of the sea. On this point, the majority and all concurring judges agreed. (68 L Ed2d 1, 15, 18, 20, 21).

The case was not tried, nor the jury instructed, upon any non-delegable duty of a ship's master to supervise the work of foreign stevedores. The instructions summarized above make that clear. The Ninth Circuit deferred decision of this case until Santos was decided, and wrote its opinion in the light of Santos. While Part IIA of the Ninth Circuit's opinion (entitled "Vessel's Duty to Longshoremen") contains some obiter unnecessary to the decision, the Court need look no further than Part IIB of the decision (entitled

"Sufficiency of the Evidence"), to determine that the Ninth Circuit properly measured plaintiff's evidence against the requirements of Santos. The Ninth Circuit held:

> "As noted above, the plaintiff presented experts who testified as to the custom in the industry with respect to the master's, and hence the vessel's, responsibility. Defendants argue that this testimony was irrelevant and entitled to no weight at all, because the experts spoke in terms of the master's duty to ensure the 'seaworthiness' of the vessel, a concept supposedly irrelevant under § 905(b). This argument, however, misses the point. The experts testified not about legal conclusions ('unseaworthiness' or 'negligence') but about custom in the industry with respect to the master's duties. Furthermore, the master is responsible for the seaworthiness of the vessel; he is simply not liable without fault to injured longshoremen. * * * Since the jury was quite properly not instructed in terms of strict liability for unseaworthiness, there is no possibility that it might have confused the two related meanings of the term.
>
> The Supreme Court in Scindia observed that a 'necessary inquiry is whether the pertinent statutes, regulations or custom place or assume a continuing duty on the

> vessel.' 101 S Ct at 1626 (Emphasis added).
>
> We believe that the expert testimony offered by plaintiff was relevant, and perhaps necessary, to establish the customary scope of the master's duties.
>
> In addition to this expert testimony, plaintiff offered the testimony of longshoremen as to how the cargo should have been shored and how long the shoring should have taken; entries into the ship's log noting when the marine carpenter entered the hold; and testimony that the master or his mates were responsible for continuous supervision of the loading operations, particularly the shoring of the cargo. Plaintiff also produced evidence that the stow of the cargo was unreasonably dangerous to the offloading longshoremen, and that the defect could not[2] have been discovered by them." (App-10-12; 651 F2d 1300, 1304-1305).

The legislative history of the 1972 amendments makes it clear that Congress did not intend to bar recovery based upon negligence simply because the shipowner's negligence renders a vessel unseaworthy. See

---

2. The underlined word was omitted from the lower court's opinion as set forth in the Appendix to the Petition (App-12).

Santos v. Scindia Steam Navigation Co., Ltd., 598 F2d 480, 485 (CA 9, 1979).

2. The decision below is not in conflict with decisions of other Circuits.

According to Petitioner, the decision below is in conflict with Ruffino v. Sandia Steam Navigation Co., 559 F2d 861 (CA 2, 1977), and Lemon v. Bank Lines, Ltd., 656 F2d 110 (CA 5, 1981). It is not. Ruffino involved injury to a longshoreman who "stepped on the end of a rug which overhung a space between two pallets of tea". Unlike our case, there was no evidence that the condition of the stow imperiled the vessel or that it was the practice of the captain and mates to eliminate all spaces, however small or unimportant, between pallets of cargo. Under such circumstances, the Second Circuit held that the shipowner "* * * was not required to supervise the minute details of the loading stevedore's

work", a ruling consistent with the facts of the case at bar, where shoring of the cargo was anything but a "minute detail".

Lemon, a post-Santos decision, is equally unlike our case. Lemon involved injury to a longshoreman arising out of a defective stow. The vessel offered evidence that it actually supervised the manner of stow in a foreign port, and considered the stow to be safe. The Fifth Circuit held that it was error for the District Court to grant judgment notwithstanding the verdict where "the chief mate had actual knowledge of the improper loading technique and failed to take actions to either correct the stowage or warn the plaintiff or his co-workers of the dangerous conditions contained within the stow."

Thus, there is no conflict between our case and Ruffino or Lemon. Indeed, Lemon

merely emphasizes the truth of the evidence offered by plaintiff's experts in our case, that ship's officers do in fact supervise important details of stowage in loading ports.

3. The Court below did not "depart from the accepted and usual course of proceedings" in failing to discuss a trivial issue raised on appeal by Petitioner, i.e., that the damages awarded Respondent Turner were excessive.

Petitioner argued before the District Court and Ninth Circuit that the damages awarded to respondent Turner were excessive. An appellate court is not guilty of misconduct when it publishes an opinion that ignores unimportant issues. Following this Court's lead in Affolder v. New York, Chicago & St. Louis Railroad Co., 339 US 96, 70 S Ct 509, 94 L Ed 683 (1950), the Ninth Circuit for many years has ruled repeatedly that it will not

second guess a trial court's judgment on damages unless it can affirmatively say that the damages are "monstrous" or "grossly excessive". Southern Pacific Co. v. Guthrie, 186 F2d 926, 933 (CA 9, 1951); Bradley Mining Co. v. Boice, 194 F2d 80 (CA 9, 1951); American Mail Line, Ltd. v. Weaver, 408 F2d 674, 675 (CA 9, 1969).

The judgment of $955,976.11 for Turner's brain injury and epilepsy was not "monstrous", and the Ninth Circuit cannot properly be faulted for failing to discuss an insignificant issue already well settled by decisions of the Ninth Circuit and of this Court.

4. The issue of indemnity under the charter between Respondent Philippine President Lines, Inc. and Petitioner Japan Line, Ltd. does not involve Respondent Turner, since Turner's verdict and judgment were against both defendants. In

any event, the Ninth Circuit appears to have determined correctly that Petitioner must bear ultimate responsibility for payment of the judgment. Contrary to Petitioner's assertions, there is no conflict among the Circuits on this issue.

The jury returned a verdict in favor of Turner against both defendants. (CR 413). The judgment entered on that verdict was against both defendants. (CR 414). Thus, the issues of indemnity raised in Paragraphs 3, 4, 5 and 6 of Petitioner's "Reasons for Granting the Writ" do not affect Respondent Turner in any way.

However, the decision of the lower Court placing ultimate responsibility for the judgment on Petitioner was proper. There is no conflict among the Circuits.

The New York Produce Exchange form of time charter normally contains a clause (usually Clause 8) which, as in our case,

provides:

> "The Captain, although appointed by the owners, shall be under the orders and directions of the charterer as regards employment and agency. Charterers are to load, stow, trim and discharge the cargo at their expense and risk under the supervision of the captain. * * *." (CR 394; Tr. 49, 137; Pl. Ex. 2).

Nichiman Company v. M.V. Farland, 462 F2d 391 (CA 2, 1972) and Fernandez v. Chios Shipping Co., Ltd., 542 F2d 145 (CA 2, 1976) hold that the charterer is responsible under Clause 8 for the master's negligence in loading and discharging cargo.

According to Petitioner, the Second Circuit is at odds with the Fifth and Sixth Circuits, but Petitioner is not correct. The most recent decision of the Fifth Circuit on this issue, Nitram, Inc. v. Cretan Life, 599 F2d 1359 (CA 5, 1979), puts that circuit squarely in the camp of the Second Circuit. See also,

Horn v. CIA De Navegacion Fruco, 404 F2d 422 (CA 5, 1968).[3]

Migut v. Hyman-Michaels Company, 571 F2d 352 (CA 6, 1978), upon which Petitioner also relies to find a conflict, holds only that Clause 8 does not apply to negligent acts or conditions outside the loading and discharging process.

Thus, all of those Courts which have confronted the issue would place responsibility for Respondent Turner's injury upon the charterer. The shipowner's answer to

---

3. Petitioner ignores these cases and cites only D/S Ove Skou v. Hebert, 365 F2d 341 (CA 5, 1966) which had held that Clause 8 does not give the time charterer "any operational control" over loading activities but is simply "a specification of the party--owner or charterer--upon whom the ultimate financial cost rests for any one or more of the activities." (365 F2d 341 at 351). However, in view of the Court's subsequent decision in Nitram, Inc. v. Cretan Life, 599 F2d 1359 (CA 5, 1979), Hebert can no longer be considered law in the Fifth Circuit.

plaintiff's Seconded Amended Complaint contained a cross-claim demand for indemnity against Petitioner as charterer. (CR 214). The Court of Appeals had authority to determine the outcome of the indemnity issue under Rule 54(c), FRCP.

5. Neither the "Federal Arbitration Act", or the "Treaty of Friendship, Commerce, and Navigation" between the United States and Japan were raised as defenses below. Moreover, the decision of the Ninth Circuit reveals no violation of the Act or Treaty.

Petitioner claims that the decision below ignores the Federal Arbitration Act, 9 U.S.C. § 1, and the Treaty of Friendship, Commerce and Navigation signed April 2, 1953 between Japan and the United States. If Petitioner contends that either of these documents has a bearing on Respondent Turner's judgment against Petitioner, Petitioner's claims come too

late in the day. Neither the Act nor the Treaty were raised by Petitioner or anyone else in pleadings or testimony in the District Court, in briefs or oral argument in the Ninth Circuit, or in the petition for rehearing which Japan Line filed after the Ninth Circuit issued its decision. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." Youakim v. Miller, 425 US 231, 234, 96 S Ct 1399, 47 L Ed2d 701 (1976).

In any event, petitioner's claims present no significant issue justifying the grant of certiorari. Under Nichiman and other cases discussed above, Japan Line's liability under the charter was clear. Furthermore, the decision of the Ninth Circuit does not draw any invidious distinction between foreign nationals and United States nationals. The responsibility of the vessel is the same whether

it flies an American or foreign flag and whether it takes on cargo at a foreign or domestic port.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANK POZZI
RAYMOND J. CONBOY

Attorneys for Respondent
James Turner